No. 88-263

In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS AND ROBBIE NUGENT, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONER

We demonstrated in the certiorari petition that the Eleventh Circuit has decided an important legal issue under the Equal Pay Act in a way that (a) ignores the language and legislative history of the statute, (b) conflicts with the Seventh Circuit's construction of the Act and with numerous district court rulings, and (c) threatens to disrupt a widespread, sex-neutral employment practice. Remarkably, respondents' brief in opposition makes *no* effort to rebut any of these contentions. Instead, respondents attempt to defend the decision below by falsely alleging that "[t]his case turns on its facts" (Br. in Opp. 11) and by mischaracterizing the court of appeals' indefensible legal rulings as "dicta" (*id.* at 18). This Court should not be misled by this strategy.

1. Respondents attempt to obscure the importance of this case by asserting that it is nothing more than a factual dispute governed by the clearly erroneous rule.

See, *e.g.*, Br. in Opp. 2-10. This implausible assertion can be fully refuted simply by reading the court of appeals' opinion, which makes clear that the court below rejected GM's "factor other than sex" defense for purely legal reasons. Pet. App. 5a-9a. Indeed, the "facts" that respondents state (and frequently misstate [1]) in elaborate

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[1] To give but a few examples of respondents' factual misstatements:

(1) Respondents imply (Br. in Opp. 6) that women who transferred from hourly to salaried jobs or who were allowed to move back and forth between such jobs were treated differently from and worse than men. To the contrary, the record shows that women as well as men retained at least their hourly rate when transferred or re-transferred to salaried positions. See R.6 (164-165); D. Ex. 1 (particularly entries for Linda Cox); GM Court of Appeals Reply Brief at 9-10 & nn.13-14.

(2) Respondents state (Br. in Opp. 17) that "[t]here is not a shred of evidence to support [GM's] assertion" that it followed its transfer pay practice throughout the nation. To the contrary, Harvey Krieger, the most senior national GM manager to testify, stated that GM followed the practice nationally without deviation, and his testimony was not contradicted. R.6 (204-205).

(3) Respondents assert (Br. in Opp. 7) that GM's transfer pay practice was "unknown to * * * top management." To the contrary, the record unequivocally demonstrates that all of the top managers who testified (Krieger, Hough and Baxter) knew of the practice. See R.6 (94, 198, 205, 244-245).

(4) Respondents assert (Br. in Opp. 4) that Sheila Glenn's promotion "entitled [her] to a pay review which allowed her salary to be placed anywhere in the 'Follow Up' scale." To the contrary, the uncontradicted evidence shows that the maximum increase upon promotion was 10%—and that Glenn received the maximum increase. R.6(190); Pet. App. 22a.

(5) Respondents claim (Br. in Opp. 6) that a GM document showed that five of seven women who transferred suffered pay cuts, while only one of 22 transferred men suffered pay cuts. Respondents acknowledge (*id.* at 6 n.9) that the document was later corrected, but they claim that it was corrected "at trial" and imply that the corrections were self-serving. Actually, the corrected document was submitted on May 25, 1985, nearly *a year* before the trial, and it was produced along with payroll records affirming its accuracy. See D. Ex. 1; P. Ex. 2(b) & 3(b); GM Court of Appeals Reply Brief at 6-7. The corrected

detail for the most part were not included in any factual findings of the district court and were not discussed at all by the court of appeals.[2] They certainly were not the basis for the court of appeals' decision.

Respondents try to suggest that GM engaged in "blatant, long-standing and intentional" discrimination on the basis of sex in setting the wages of follow-up workers and that its practices were anything but sex-neutral. See, *e.g.*, Br. in Opp. 11, 15. Unfortunately for respondents, the district court and the court of appeals did not accept these allegations. Thus, contrary to respondents' assertions, neither court below found that GM had no transfer pay practice; rather, both courts referred to GM's treatment of pay following transfer as a "practice" (and that is why GM refers to it as such in its peti-

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document showed that 10 transferred employees suffered pay cuts—8 of them men, all of the cuts small, and all due to clerical errors. Respondents did not offer any evidence to rebut the corrected document and the supporting payroll records.

Respondents compound their misstatement by claiming (Br. in Opp. 6) that Charles Hough testified that five of the seven transferred women suffered pay cuts. That is hardly a fair characterization of Hough's testimony; he testified that the original document showing that five women suffered pay cuts was incorrect and that only two suffered cuts. See R.6 (162-163).

[2] It is interesting that respondents purport to describe "The District Court Case" (Br. in Opp. 2), rather than "The District Court Opinion." Compare Br. in Opp. 10 ("The Court of Appeals' Holding").

Many of the "facts" cited by respondents are entirely irrelevant to the dispute between respondents and GM. For example, respondents make much of the wages that Nugent, Tanley, Greenlee, Stephenson, Downs and Wales received when they first became follow-up workers. Br. in Opp. 3-4. They fail to mention that these events occurred more than three years before respondents commenced these actions and that the statute of limitations thus bars their consideration. Respondents also emphasize the comparison between Tanley and respondent Nugent (Br. in Opp. 3) without mentioning that Tanley left his follow-up job long before the relevant period.

tion). Pet. App. 6a-7a & n.8, 28a.[3] Similarly, the district court specifically held that "GM * * * created the pay disparity concerning [respondents] in good faith believing the disparity justified on the basis of their hourly transfer 'pay policy'" and that the individual company officials who set respondents' salaries also acted in good faith on the basis of what they believed to be valid company policy. Pet. App. 32a, 40a. The court of appeals did not disturb those findings.

Instead, the Eleventh Circuit ruled against GM on the ground that a "salary retention" practice alone could not qualify as a "factor other than sex" under the Equal Pay Act. Pet. App. 8a-9a. Under the court of appeals' holding, an employer who bases a transferred employee's salary on his or her previous salary violates the Act if that practice results in pay differentials between men and women in any job classification. This rule would apply without regard to whether sex discrimination played any part in the employer's decisions (either at the time of initial hiring or at the time of transfer) and without regard to whether the employer's practice had a differential impact on women on a plantwide or company-wide basis. *Ibid.* *That* is the clear basis for the decision below, not—as respondents would revise it—a determination that GM intentionally discriminated on the basis of sex.

2. Respondents next attempt to avoid further review of the Eleventh Circuit's ruling by contending that the passages we quote are merely "dicta." Br. in Opp. 11, 18. According to respondents, the Eleventh Circuit's interpretation of the Equal Pay Act was "unnecessary to the court's holding on the facts of this case" and "do[es] not create a conflict." There are several serious problems with this assertion.

First, respondents' position is contrary to the plain language of the court of appeals' opinion. The Eleventh

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[3] Strangely, respondents accuse GM of "sleight-of-hand" for using the very term ("practice") that both courts below used. Br. in Opp. 16 n.15.

Circuit quite clearly rejected GM's "factor other than sex" defense not because of evidence of actual sex discrimination but because, in the court's words, "[t]he pay disparity at issue here" did not result from "unique characteristics of the same job; from an individual's experience, training or ability; or from special exigent circumstances connected with the business." Pet. App. 8a-9a.[4]

Second, respondents' position is contrary to the court of appeals' contemporaneous characterization of its decision. The Eleventh Circuit correctly "recognize[d] that our *holding* may contradict the Seventh Circuit's holding in *Covington* v. *Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S. Ct. 146 (1987)." Pet. App. 9a (emphasis added). The court below "reject[ed] *Covington* because it ignores that prior salary alone cannot justify pay disparity." *Ibid.* Although respondents apparently believe that these statements are dicta, the Eleventh Circuit obviously believed that its "holding" was in conflict with the Seventh Circuit's construction of the Equal Pay Act.

Third, respondents' position is contrary to the way in which the Eleventh Circuit continues to characterize the decision in this case. In *Price* v. *Lockheed Space Operations Co.*, No. 87-3574 (11th Cir. Oct. 7, 1988), the court of appeals applied its *Glenn* rule in holding that a company's sex-neutral nondiscriminatory practice of paying skilled employees what they made at their previous jobs was not a "factor other than sex" and would violate the

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[4] Nowhere does the court of appeals say anything to support respondents' bald assertion that it found GM to have engaged in intentional sex discrimination. Indeed, even the district court found that GM's sex-neutral transfer practice, although applied in good faith and in a nondiscriminatory manner, violated the Equal Pay Act only because "historically companies may and do hire women at lower starting salaries" (Pet. App. 28a). There was no evidence in this case that GM set entry-level salaries in a discriminatory manner.

Equal Pay Act if it resulted in a pay disparity between men and women.

In *Price*, the National Aeronautics and Space Administration (NASA) decided to consolidate service operations previously performed by 12 separate contractors into a single contract. The agency expressed concern that the employees who previously did the work for the separate contractors not suffer pay reductions if they were retained by the single contractor.[5] Lockheed (in bidding for the single contract) therefore pledged to pay those employees what they earned in their previous job. When Lockheed was awarded the contract and fulfilled its pledge to NASA, one employee sued, claiming that she was paid less than men performing the same work. In defense, Lockheed claimed that its salary retention practice was a "factor other than sex." The Eleventh Circuit reversed a summary judgment in favor of Lockheed, holding that "[i]n *Glenn* v. *General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988), a panel of this court rejected the very argument [Lockheed] advances here." Slip op. 36.

Thus, the Eleventh Circuit certainly does not regard as "dicta" the legal rulings challenged in the certiorari petition. Instead, it has continued to follow the holding in this case in circumstances that conflict with the decisions of other courts and that are wholly at odds with the language, legislative history and purposes of the Equal Pay Act. Notwithstanding respondents' effort to construct a factbound justification for the judgment in this case based on erroneous "facts" not found or discussed by either court below and citations to passages out of context,[6] the Eleventh Circuit issued a broad and

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[5] In fact, NASA told the contractors that any instances of reduced compensation might be regarded as evidence that the contractor lacked sound business judgment. Slip op. 35.

[6] Respondents' report of the colloquy between Charles Hough and the trial judge is an example of an incomplete passage taken out of context. Hough later testified that GM does not pay women less

general legal ruling that it has already applied in other cases. Respondents' brief amounts to nothing more than a claim that, even if the court of appeals had applied the correct legal rule, they might still have prevailed. Even if that speculation were correct, however—and there is substantial evidence in the record to prove that it is not—GM is still entitled to have the claims against it assessed under the proper legal standard.

3. It is telling, but not surprising, that respondents make no serious effort to defend the court of appeals' construction of the Equal Pay Act. Respondents make no attempt to respond to our contention that Congress and the EEOC plainly contemplated that the "factor other than sex" defense would encompass sex-neutral transfer pay practices similar to the one at issue in this case. Respondents also make no attempt to rebut our submission that thousands of employers throughout the United States utilize transfer pay and other wage retention policies similar to GM's practice. See EEAC Am. Br. 7. Thus, if this Court disagrees with respondents' specious suggestions that the decision below is "fact-bound" or that the Eleventh Circuit's statements are "dicta," respondents have offered absolutely no reason why the Court should not grant review of this plainly erroneous interpretation of an important federal statute.

Respondents do assert (Br. in Opp. 20-21) that GM's comparison of its transfer pay practice to "red-circle" rates is a "red herring" because "red-circle" rates can be regarded as a valid "factor other than sex" only if they

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than men for the same job and that women are not willing to do the same work as men for less money. R.6 (169-171).

By lodging the trial transcript and other documents, respondents apparently believe they can convince the Court to consider "facts" not found by the district court or discussed by the court of appeals and to ignore the critical (and defective) reasoning of the court of appeals. But GM is not challenging any fact findings as clearly erroneous. It is instead challenging the court of appeals' unambiguous legal ruling, and respondents cannot obscure that ruling in a cloud of lodged—but not found—"facts."

are temporary in nature. There is no support for respondents' position. As we pointed out in the petition (at 12), the federal regulation concerning "red-circle" rates gives a specific example that would violate respondents' (and the Eleventh Circuit's) definition: a long-service employee who is transferred to an ordinarily lower-paying job because he is no longer able to perform his previous job. 29 C.F.R. § 1620.26(a). Employers apply "red-circle" rates and other non-temporary salary retention practices for a variety of valid, nondiscriminatory reasons. Pet. 24-26. Respondents' argument (and the Eleventh Circuit's decision) would regard those practices as Equal Pay Act violations even though sex discrimination plays no role in their implementation. Such a radical expansion of the Act should be given close scrutiny by this Court.

4. Relying entirely on authorities dealing with merit or seniority systems, respondents also argue (Br. in Opp. 14) "that to constitute an affirmative defense under the Act, an alleged sex-neutral policy must be organized, structured, objective and employ predetermined criteria." That argument makes no sense. It may very well be that the merit *system* and the seniority *system* defenses (see 29 U.S.C. § 206(d)(1)(i), (ii)) require proof of a structured *system*, but from that it does not follow that the same requirements must be imposed on the "factor other than sex" defense. No court has done so. In fact, in one of the cases relied on by respondents, the court of appeals, while questioning whether the employer's conduct fell within the merit system exception, held that an employer's subjective evaluation that a male employee had greater supervisory and managerial potential was a "factor other than sex." *EEOC* v. *Aetna Ins. Co.*, 616 F.2d 719, 725-726 (4th Cir. 1980). See also H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Admin. News 687, 689 (noting that such non-systematic, unstructured factors as differences in training, experience or ability would be factors other than sex.)

5. Finally, respondents make little effort to reconcile the court of appeals' decision with *McLaughlin v. Richland Shoe Co.* 108 S. Ct. 1677 (1988). The Eleventh Circuit's conclusion that GM's conduct met the "reckless disregard" standard simply cannot survive *Richland Shoe*. The district court expressly found that both GM and its officials acted in good faith. See Pet. App. 32a, 40a. The court of appeals, without disturbing those findings, held that GM showed reckless disregard because it relied on a legal theory it should have known to be erroneous. Pet. App. 13a. But in *Richland Shoe*—decided *after* the court of appeals' decision—this Court held that even if an employer acts unreasonably in determining its legal obligations its actions cannot be regarded as willful. 108 S. Ct. at 1682 n.13. To argue that GM acted recklessly because it did not seek legal advice as to the validity of its practice or because it "fail[ed] to investigate its legal obligations" (Br. in Opp. 24) is to ignore *Richland Shoe* and once again to "virtually obliterate[] any distinction between willful and nonwillful violations." 108 S. Ct. at 1681.[7]

Beyond this, although respondents argue that this case "presents no reason for the Court again to consider the [willfulness] issue "(Br. in Opp. 22), they fail to present any reason why the Court should not, at a minimum, remand the case to allow the court of appeals to reconsider that issue in light of the intervening decision in *Richland Shoe*. This is the course that the Court has

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[7] In arguing that GM showed reckless disregard for its obligations under the Equal Pay Act, respondents assert (Br. in Opp. 23) that GM was aware since 1975 that its transfer pay practice violated the Act. It is difficult to reconcile respondents' claim in that regard with its earlier claims that no such practice existed and that GM officials were unaware of the practice! See Br. in Opp. 7, 13-16. Moreover, although Defendants' Exhibit 2, cited by respondents, does state that GM's transfer pay practice might result in pay disparities that some might question on Equal Pay Act grounds, it certainly does not indicate that GM officials believed the practice in fact violated the Act. See D. Ex. 2 at 17-19.

repeatedly followed in identical circumstances. See Pet. 21-22 n.5; *Shirk* v. *McLaughlin*, No. 87-2079 (U.S. Oct. 3, 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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